

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DAVID WILCOX,

Defendant-Appellant.

UNPUBLISHED

May 22, 2001

No. 215817

Lapeer Circuit Court

LC No. 98-006311-FC

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of third-degree criminal sexual conduct MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant appeals as of right, and we affirm. However, we remand for clarification of certain information contained in the presentence investigation report and to correct the judgment of sentence.

I. Basic Facts and Procedural History

The victim is defendant's stepdaughter. She and her two brothers visited her mother and defendant every other weekend pursuant to court order. Defendant and the victim's mother live in a small three room camping trailer. Because of the limited space, the sleeping arrangements required the victim, defendant, and the victim's mother to all sleep together on a pullout couch while the victim's brothers slept on the floor. Testimony adduced at trial revealed that the victim's mother slept between defendant and the victim. The victim testified that defendant touched her and digitally penetrated her vagina on three separate occasions while the victim laid in bed and while her mother was sleeping. The victim did not immediately report the incident but rather, confided in an aunt who thereafter drove the victim to the police station where the victim filed a police report. Defendant was ultimately charged with three counts of criminal sexual conduct in the third degree (CSC III)¹. After trial, the jury acquitted defendant on two of the counts, finding him guilty on the third. Defendant appeals his conviction.

¹ Defendant was originally charged with three counts of first degree criminal sexual conduct MCL 750.520b; MSA 28.788(2). The prosecutor later amended the charges to third degree criminal sexual conduct.

II. The Trial Court's Removal of Jurors for Cause

First, defendant argues that he was denied a fair trial when the trial court excused four prospective jurors for cause. We disagree. Challenges for cause premised on bias are reviewed for an abuse of discretion. *People v Williams*, 241 Mich App 519,521; 161 NW2d 710 (2000).

During voir dire, the prosecutor asked the prospective jurors whether they would be able to convict defendant on the victim's testimony alone without any corroboration if the juror believed the victim's testimony beyond a reasonable doubt. The trial court asked additional questions to clarify whether the prospective jurors would be able to follow the court's instruction that the victim's testimony is sufficient, onto itself, and need not be corroborated. See MCL 750.520h; MSA 28.788(8). When some prospective jurors indicated that they would have difficulty following such an instruction, stating that they would "expect more," would need "physical evidence" to substantiate the victim's claim, or otherwise outright disagreed with the instruction, the trial court excused them for cause.

Contrary to defendant's argument, this was proper. MCR 2.511(D)(3), (4) and (5) provides in pertinent part that a challenge for cause exists where the juror:

(3) is biased for or against a party or attorney.

(4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be.

(5) has opinions . . . that would improperly influence the person's verdict.

The prosecutor is entitled to a fair and impartial jury, *People v Marsh*, 108 Mich App 659, 671; 311 NW2d 130 (1981), and it was appropriate for the prosecutor to ascertain whether the prospective jurors could follow the applicable law. All of the jurors excused for cause indicated that they would need something more than just the uncorroborated testimony of the victim. Their convictions or state of mind could necessarily "improperly influence the person's verdict" or otherwise prevent that person from "rendering a just verdict" since corroborating evidence is not required under the law. Defendant contends that the prosecutor misrepresented the nature of the evidence, since the victim's testimony was in fact corroborated. However, defendant ignores that the jury was free to believe or disbelieve, in whole or in part, any of the evidence the prosecutor presented. *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999) (citing *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975)). Therefore, the prosecutor was entitled to explore the ability of the prospective jurors to render a fair and impartial verdict in the event that the jury disbelieved *all* of the evidence *except* the victim's testimony. Accordingly, we find that the trial court did not abuse its discretion by excusing the prospective jurors for cause. See *People v Williams*, 241 Mich App 519, 521-522; 161 NW2d 710 (2000).

III. Failure to Instruct on Cognate Lesser Included Offenses

Next, defendant argues that the trial court erred by denying his request to instruct the jury on the lesser offense of fourth-degree criminal sexual conduct (CSC IV)². This court reviews a trial court's determination whether an instruction applies to the facts of the case for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

CSC IV is a cognate lesser offense of CSC III. A cognate lesser offense is one that is of the same class or category as the higher offense but may contain some elements not found in the higher offense. *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325 (1996) amended 453 Mich 1204 (1996). CSC IV requires proof of sexual contact for the purpose of sexual arousal or gratification, while CSC III requires proof of sexual penetration for any purpose. MCL 750.520a(k) & (l); MSA 28.788(1)(k) & (l). See also *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). The trial court must grant a requested instruction on a cognate lesser offense only where the requested instruction is consistent with the evidence and with defendant's theory of the case. *Id.* at 254; *Bailey*, *supra*, at 667.

In the case at bar, the trial court did not abuse its discretion by finding that the requested instruction on CSC IV was factually inconsistent with defendant's theory of the case. The prosecutor presented evidence that defendant digitally penetrated the victim's vagina. Defendant adamantly denied penetrating or even touching the victim's vagina. Rather, defendant's theory of the case was that he might have unintentionally touched the victim's non-intimate body parts and that the victim fabricated the allegations. Since CSC IV requires proof of intentional sexual contact for the purpose of sexual arousal or gratification, defendant's theory of the case was inconsistent with the elements of CSC IV. Under these circumstances, the trial court appropriately denied defendant's requested instruction.

IV. Alleged Evidentiary Errors

Defendant also argues that he was denied a fair trial by the admission of the victim's statement that she disliked defendant because he beat her mother. Defendant argues that this statement was not relevant, that it was more prejudicial than probative, and that it constituted improper other-acts evidence under MRE 404(b). However, defendant did not object at trial on these same grounds. Accordingly, this issue is not properly preserved for appellate review. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Notwithstanding, this court may consider unpreserved issues on appeal where failure to do so would result in manifest injustice. *Id.* In the case at bar, the victim's statement was relevant for the proper purpose of explaining that she failed to immediately report the abuse because she was afraid of defendant. This statement, far from being unduly prejudicial, actually supported defendant's theory at trial; specifically, that the victim fabricated the allegations against

² MCL 750.520e; MSA 28.788(5).

defendant because she disliked him and wanted him excised from her life. We do not find error requiring reversal in this regard.

V. Proportionality of Sentence

Defendant contends that his sentence of five to fifteen years' imprisonment is disproportionately severe. We disagree and conclude that defendant's sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Challenges to sentencing are reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (2000).

Here, the trial court noted that defendant betrayed his stepdaughter's trust and failed to protect her vulnerability. The court also noted that defendant's stepdaughter will have to live with the stain of his crime for the remainder of her life and will suffer profound psychological scars that will be difficult to heal. It was appropriate for the trial court to consider the nature and severity of the offense, including the familial relation between the victim and the defendant, as well as the psychological harm sexual abuse can have on child victims. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999); *People v Girardin*, 165 Mich App 264, 266-267; 418 NW2d 453 (1987). A review of the record in the instant matter reveals that the trial court did not abuse its sentencing discretion.

VI. Scoring of the Sentencing Guidelines

Defendant's challenge to the scoring of the sentencing guidelines does not provide a basis for relief. Defendant failed to raise this issue at sentencing or as soon as the inaccuracy could reasonably have been discovered. Accordingly, defendant may not raise this challenge on appeal. See MCR 6.429(C)³. Nevertheless, the sentencing guidelines are only a means by which to achieve a proportionate sentence. Consequently, where defendant received a proportionate sentence, an error in scoring the guidelines does not provide a basis for appellate relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998); *People v McAllister*, 241 Mich App 466, 474; 616 NW2d 203 (2000).

We reject defendant's assertion that the trial court's stated intention of sentencing defendant within the guidelines affects this analysis. Even if the guidelines were scored as defendant contends they should have been, a five-year minimum term would have nevertheless been proportionate, given the familial relationship between defendant and the victim. See *People v Houston*, 448 Mich 312, 320, 323; 532 NW2d 508 (1995) (stating that the "key test" of proportionality is whether the sentence imposed reflects "[t]he seriousness of the matter."). Accordingly, we hold that the trial court did not commit error requiring reversal in this regard.

³ MCR 6.429(C) provides in pertinent part that: "[a] party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered.").

VII. Ineffective Assistance of Counsel

Defendant argues further that he was denied the effective assistance of counsel because trial counsel failed to object to the prosecutor's improper assumption of fact by dismissing four jurors for cause and failed to object to improperly scored guidelines.

Claims for ineffective assistance of counsel should be raised by motion for a new trial or evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Since the defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for the deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (citations omitted.)

In the case at bar, defendant failed to satisfy his burden to rebut the presumption of effective assistance of counsel. With regard to defendant's argument that trial counsel failed to object when four jurors were dismissed for cause, we find defendant's argument unpersuasive. As previously discussed, the four jurors that the court dismissed for cause stated that they would not be able to convict defendant on the victim's testimony alone or otherwise indicated that they would need something more.

Defendant also argues that trial counsel failed to object to the improperly scored guidelines. We do not find defendant's argument persuasive. Defendant received a proportionate sentence pursuant to the guidelines. Accordingly, defendant failed to demonstrate the requisite prejudice ostensibly resulting from counsel's alleged deficient representation. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

VIII. Claim for Sentencing Credit

Defendant next suggests that he was entitled to four days' sentence credit for time served in jail pursuant to MCL 769.11b; MSA 28.1083(2) after he was convicted. However, defendant failed to provide this Court with a record to verify the factual basis underlying the requested relief. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). A review of the lower court record indicates that upon conviction, the court revoked defendant's personal recognizance bond and set a ten-percent cash bond at \$10,000. Defendant indicates that he was remanded into custody on August 6, 1998. However, the docket entries included in the lower court file reveal that bond was not posted until August 10, 1998. MCL 769.11b; MSA 28.1083(2) provides that:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

The principal purpose for the sentencing credit statute is to "[e]qualize, as far as possible, the status of the indigent or lower-income accused with the status of the accused who can afford

to post bail.” *People v Givans*, 227 Mich App 113, 125; 575 NW2d 84 (1997). Indeed, an “essential prerequisite” to obtain an award under the sentence credit statute is to establish the inability to post bond. *People v Scott*, 216 Mich App 196, 199; 548 NW2d 678 (1996). At no time did defendant ever suggest that he was financially unable to post bond. *People v Whiteside*, 437 Mich 188, 196; 468 NW2d 504 (1991). Moreover, defendant did not demonstrate that he actually served four days in jail. Although the docket entries indicate that bond was posted on August 10, 1998, a receipt contained in the lower-court file indicates that bond was actually *received* on August 6, 1998; the very same day that defendant was remanded into custody. Given the uncertainty of the record regarding whether defendant was entitled to the sentence credit, we find no mistake apparent from the existing record and thus, find no error.

IX. Presentence Investigation Report

Defendant raises one meritorious issue on appeal. At sentencing, defendant challenged information contained in the presentence investigation report (PSIR) which stated that he threatened the victim’s family. The trial court responded by simply stating as follows:

Well, at this point in time, that’s what the victim’s family stated to the Adult Probation Department. That’s their position. If your client feels that he didn’t, that’s neither here nor there.

We agree with defendant’s argument on appeal that the trial court failed to adequately respond to defendant’s challenge. When faced with a challenge as to the accuracy of information contained in the PSIR, the trial court must either make a finding regarding the accuracy of the challenged information, accept the defendant’s version, or strike the challenged information and not consider it when fashioning a sentence. MCR 6.425(D)(3); See also *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

In the case at bar, the trial court’s response was unclear. We therefore remand to the trial court for further clarification. The correct procedure on remand is as follows:

On remand, the court need only clarify whether the disputed matter played a role in its sentencing decision. If the court determines that it did, defendant shall be resentenced and the court shall resolve the challenge pursuant to MCR 6.425(D)(3). If it is determined that the disputed matter played no part in the sentencing decision, defendant’s sentence is affirmed and the trial court need only strike the disputed matter from the presentence report. [*People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1999).]

If the information is stricken, the trial court must transmit a corrected copy of the PSIR to the Department of Corrections. *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995).

Although not raised by defendant, we also direct the trial court to correct an error in the judgment of sentence. Although defendant was convicted of one count of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), the judgment of sentence erroneously indicates that defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA

27.788(2). A trial court speaks through its written judgments. *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993). Therefore, it is of the utmost importance that the judgment of sentence accurately reflect the offense for which defendant stands convicted.

Affirmed, but remanded for clarification of the PSIR and correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Michael R. Smolenski

/s/ Patrick M. Meter